A

MERBOK HILIR BHD

v.

SHEIKH KHALED JASSEM MOHAMMAD JASSEM AL-THANI & OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
ABDUL AZIZ RAHIM JCA
MOHAMAD ARIFF YUSOF JCA

C [CIVIL APPEALS NO: P-02-1153-05-2012, P-02(IM)-876-04-2012, P-02(IM)-877-04-2012 & P-02(IM)-2678-10-2011]
8 MAY 2013

D ***CIVIL PROCEDURE:*** *Appeal - Appellate interference - Whether there was clear error leading to perverse finding or miscarriage of justice - Whether appellate interference warranted*

E ***CONTRACT:*** *Agency - Agent - Identity of agent - Whether plaintiff was proper agent of defendant - Defendant dealing with some other party in the defendant's group - Whether agency contract affected by internal arrangement within defendant's group*

F ***CONTRACT:*** *Agency - Termination - Verbal agency agreement - Termination after 8 1/2 years - Whether three months' notice of termination reasonable - Whether six months' notice required - Damages for wrongful termination*

G H I The plaintiff/respondent ('Petroserv') was appointed, sometime in 1994, as the sole and exclusive agent for the defendant/appellant ('Merbok') to market the defendant's goods (*ie*, timber and timber-related products) in the Middle East. The appointment and the terms of the agency were not reduced into writing but were purely verbal. The agreement was entered into with one John Frederick Keen ('JFK') who was at the material time the Manager of Petroserv. The agency which was not for a fixed term was terminated with effect from 1 January 2003, *ie*, after about 8 1/2 years, when Merbok sent a letter of termination to Petroserv in Dubai. The letter of termination was addressed to "Petroserv-JFK Division". Petroserv requested for more time for it to find alternative suppliers but Merbok refused. Hence, Petroserv initiated legal proceedings against Merbok. The learned Judicial Commissioner ('JC') entered judgment in Petroserv's favour and awarded damages for unpaid commission during the period of

notice given as well as damages for wrongful termination of the agency without giving sufficient notice. The JC held that a six months' notice period would have been proper. Since effectively prior notice of three months was given to Petroserv, the damages was calculated on the basis of three months' lost commission. Merbok appealed against this decision. The principal issue in the appeal was whether the notice of termination given was sufficient. The appellant contended that the JC erred in determining that there should be a notice period of six months since the contract here was not a fixed-term contract, and as such, ss. 158 and 159 of the Contracts Act 1950 ('CA50') would not apply. On the issue of *locus standi*, the appellant claimed that they had dealings only with JFK trading as Petroserv-JFK Division, not with Sheikh Khaled Jassem trading as Petroserv General Trading Establishment. JFK was an employee of Petroserv with the Sheikh being the licence holder under the laws of Dubai.

Held (dismissing appeal with costs)
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) At all material times, whatever the arrangement between JFK and the plaintiff or the Sheikh, whether legal or illegal, was never the concern of the defendant and whatever arrangement between them did not affect the contract of agency between the plaintiff and defendant. The business arrangement between the plaintiff and JFK was an internal affair of the company which was of no concern to the defendant and could not be a valid ground to vitiate contracts concluded on the effort of Petroserv or JFK. Anyways, Petroserv-JFK Division was part and parcel of the plaintiff. (para 10)

(2) Reasonable notice of termination must still be accorded even though an agency contract was not for a fixed term. What amounts to a reasonable notice is dependent on the facts and circumstances of the particular case; *Biing Han Enterprise Sdn Bhd v. Siew Leong* (foll). (para 20)

(3) An agency relationship rests on trust and confidence and shares some similarities with the relationship between an employer and employee. Where an agency is contractually for a fixed term, and quite often parties agree on a clear notice

A period, they should be bound by it. In any event, the period of notice has to be reasonable, and furthermore, a fixed term agency cannot be terminated without sufficient cause, consistent with ss. 157 and 158 of the CA50. Where parties have not expressly agreed upfront on a period of notice and
B the contract is not for a fixed term, although in most cases of commercial agency it will be of a continuing nature, termination should also be preceded by a reasonable period of notice. (para 22)

C **(4)** The jurisdiction of the Court of Appeal to intervene against a decision of the High Court has to rest on settled principles; the court should only upset a decision of the High Court where there is a clear error leading to a perverse finding or resulting in a miscarriage of justice, particularly where the
D lower court has decided on the basis of discretion. Where there has been a proper judicial appreciation of the evidence and a correct application of the law and it cannot be said that the learned judge has been plainly wrong, the High Court decision should be respected. (para 23)

E **(5)** The JC had meticulously considered the peculiar circumstances of the case, and was satisfied that a period of six months was a fair and reasonable period for Petroserv to adjust its business after having lost a major part of its income by way of the commissions received from the agency contract with
F Merbok. The JC came to a correct decision both on the law and the facts which should not be interfered. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

G Plaintif/responden ('Petroserv') telah dilantik, sekitar tahun 1994, sebagai agen mutlak dan eksklusif bagi defendan/perayu ('Merbok') untuk memasarkan barangan defendan (iaitu balak dan bahan berkaitan balak) di Timur Tengah. Perlantikan dan terma-terma agensi tersebut tidak bertulis tetapi hanya secara lisan. Perjanjian
H tersebut dimasuki dengan seorang yang bernama John Frederick Keen ('JFK') yang pada masa material adalah pengurus Petroserv. Agensi yang bukan untuk terma tetap tersebut dibatalkan berkuatkuasa dari 1 Januari 2003, iaitu, selepas kira-kira 8 1/2 tahun, apabila Merbok menghantar surat pembatalan kepada
I Petroserv di Dubai. Surat pembatalan tersebut dialamatkan kepada "Petroserv-JFK Division". Petroserv meminta lebih masa untuk

mencari pembekal alternatif tetapi Merbok enggan. Maka, Petroserv memulakan prosiding undang-undang terhadap Merbok. Yang Arif Pesuruhjaya Kehakiman ('PK') memasukkan penghakiman memihak kepada Petroserv dan mengawardkan ganti rugi bagi komisyen yang tidak berbayar semasa tempoh notis diberikan dan juga ganti rugi bagi pembatalan salah agensi tersebut tanpa memberikan notis yang mencukupi. PK memutuskan bahawa tempoh notis enam bulan adalah wajar. Memandangkan notis awalan tiga bulan telah diberikan secara efektifnya kepada Petroserv, ganti rugi dikira berdasarkan kerugian komisyen tiga bulan. Merbok merayu terhadap keputusan tersebut. Isu utama dalam rayuan adalah sama ada notis pembatalan yang diberikan adalah mencukupi. Perayu menghujah bahawa PK terkhilaf dalam memutuskan bahawa perlu ada tempoh notis enam bulan kerana kontrak tersebut bukannya suatu kontrak terma tetap, dan oleh demikian, ss. 158 dan 159 Akta Kontrak 1950 ('Akta') tidak terpakai. Atas isu *locus standi*, perayu menghujah bahawa mereka berurusan hanya dengan JFK yang berniaga sebagai Petroserv-JFK Division, dan bukan dengan Sheikh Khaled Jassem yang berniaga sebagai Petroserv General Trading Establishment. JFK adalah pekerja Petroserv dengan Sheikh sebagai pemegang lesen di bawah undang-undang Dubai.

Diputuskan (menolak rayuan dengan kos)
Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Pada setiap masa material, apa-apa urusan antara JFK dan plaintif atau Sheikh, sama ada sah atau tidak sah, tidak berkaitan dengan defendan dan apa-apa urusan di antara mereka tidak menjejaskan kontrak agensi antara plaintif dan defendan. Urusan perniagaan di antara plaintif dan JFK adalah urusan dalaman syarikat yang tidak berkaitan dengan defendan dan tidak boleh menjadi alasan sah untuk membatalkan kontrak yang dimuktamadkan atas usaha Petroserv atau JFK. Walau apapun, Petroserv-JFK Division adalah sebahagian daripada plaintif.

(2) Notis pembatalan yang munasabah masih perlu diberikan walaupun kontrak agensi tersebut bukan untuk terma yang tetap. Apa yang menjadikan sesuatu notis munasabah bergantung kepada fakta dan hal keadaan sesuatu kes; (*Biing Han Enterprise Sdn Bhd v. Siew Leong*, diikuti).

A **(3)** Hubungan sesuatu agensi terletak pada kepercayaan dan keyakinan dan berkongsi beberapa persamaan dengan hubungan antara majikan dan pekerja. Apabila sesuatu agensi secara kontrak adalah untuk terma yang tetap dan selalunya pihak-pihak bersetuju atas tempoh notis yang jelas, mereka
B harus terikat olehnya. Walau bagaimanapun, tempoh notis perlulah munasabah, dan selanjutnya, tempoh agensi yang tetap tidak boleh dibatalkan tanpa alasan yang mencukupi, konsisten dengan ss. 157 dan 158 Akta. Apabila pihak-pihak tidak secara jelas bersetuju mengenai tempoh notis dan kontrak
C bukan untuk tempoh yang ditetapkan, walaupun dalam kebanyakan kes agensi komersial ia adalah bersifat berterusan, pembatalan seharusnya didahului oleh tempoh notis yang munasabah.

D **(4)** Bidang kuasa Mahkamah Rayuan untuk campur tangan terhadap keputusan Mahkamah Tinggi seharusnya berdasarkan prinsip-prinsip yang matan; mahkamah hanya boleh mengganggu keputusan Mahkamah Tinggi apabila terdapat kekhilafan yang jelas yang menjurus kepada dapatan yang salah
E atau mengakibatkan ketidakadilan, khususnya apabila mahkamah bawahan telah memutuskan atas alasan budi bicara. Apabila terdapat penilaian kehakiman terhadap keterangan dan pemakaian betul undang-undang dan ia tidak boleh dikatakan bahawa yang arif hakim jelas khilaf, keputusan Mahkamah
F Tinggi wajar dihormati.

(5) PK telah mempertimbangkan dengan teliti hal keadaan khusus kes dan berpuas hati bahawa tempoh enam bulan adalah adil dan munasabah untuk Petroserv menyelaraskan perniagaannya
G selepas kehilangan sebahagian besar pendapatannya melalui komisyen yang diterima daripada kontrak agensi tersebut daripada Merbok. PK mencapai keputusan yang betul kedua-duanya di sisi undang-undang dan fakta yang tidak wajar diganggu.

H **Case(s) referred to:**

American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA ***(refd)***

Biing Han Enterprise Sdn Bhd v. Siew Leong [2011] 4 CLJ 465 CA ***(foll)***

Chan Chow Kian v. International Trading Company [1969] 1 LNS 20 HC
I ***(refd)***

JK Sayani v. Bright Brothers Pvt Ltd AIR 1980 Mad 162 ***(refd)***

Lonsdale (Trading as Lonsdale Agencies) v. Howard & Hallam Ltd [2007] UKHL 32 ***(refd)***
Martin-Baker Aircraft Co Ltd v. Canada Flight Equipment Ltd [1955] 2 QB 556 ***(refd)***
Sykt Jaya v. Star Publications (M) Bhd [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151 HC ***(refd)***
Wong Pa Hock v. American International Assurance Co Ltd & Anor [2002] 2 CLJ 267 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 157, 158, 159
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 14A, O. 20 r. 9, O. 33 r. 2

Contracts Act 1872 [Ind], ss. 205, 206

For the appellant - Karin Lim (Shareen Abdul Manan with her); M/s Presgrave & Matthews
For the respondent - Simon Hue Fook Chuan (Goh Chee Hong with him); M/s Simon Hue & Assocs

[Editor's note: For the High Court judgment, please see Sheikh Khaled Jassem Mohammad Jassem Al-Thani v. Merbok Hilir Bhd (No 2) [2013] 1 CLJ 728]

Reported by Amutha Suppayah

JUDGMENT

Mohamad Ariff Yusof JCA

[1] These appeals are from the judgment of the Penang High Court, after a full trial (Civil Appeal No. P-02-1153-05-2012) which was heard together with three related interlocutory appeals, namely Civil Appeals No. P-02(IM)-876-04-2012, P-02(IM)-877-04-2012 and P-02(IM)-2678-10-2011. The appellant was the defendant before the Penang High Court, the respondent was the plaintiff. Appeal No. 876 is the appellant's appeal against the decision of the Penang High Court in relation to an oral amendment to the name of the respondent, which was allowed, to its present form where the respondent is now described as "Sheikh Khaled Jassem bin Mohammad Jassem Al-Thani berniaga sebagai Petroserv General Trading Establishment". Appeal No. 877 is likewise the appellant's appeal against a decision of the High Court dismissing its application to strike out the respondent's writ of summons and statement of claim. Appeal No. 2678 is the

A appellant's appeal against the decision of the Penang High Court which dismissed its application under O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980 in relation to a preliminary point of law on the *locus standi* of the respondent. The plaintiff had originally sued the appellant/defendant as "Petroserv General
B Trading Establishment".

[2] The respondent (Petroserv) has cross-appealed in the main appeal on the quantum of damages and costs awarded.

Material Factual Background

C

[3] The background facts to this dispute have been analysed by the learned Judicial Commissioner of the Penang High Court in his comprehensive judgment. It is only necessary for purposes of the appeals to summarise the salient facts. The plaintiff/respondent
D ("Petroserv") was appointed as the sole and exclusive agent for the defendant/appellant ("Merbok") to market the defendant's goods (ie, timber and timber-related products) in the Middle East. This appointment occurred sometime in 1994. The appointment and the terms of the agency were not reduced into writing. It was
E a purely verbal arrangement between the parties. The agreement was entered into between one John Frederick Keen and Robert Kokshoorn in April 1994. John Frederick Keen was at the material time the Manager of Petroserv, whilst Robert Kokshoorn was Merbok's Chief Executive Officer.

F

[4] This sole and exclusive agency was not for a fixed term. A commission of 3% on the costs of Merbok's goods and all freight charges was to be paid by Merbok to Petroserv for successful orders obtained by Petroserv for Merbok.

G

[5] The facts disclose that their relationship of principal and agent was terminated with effect from 1 January 2003, ie, after about 8½ years, when Merbok sent a letter of termination to Petroserv in Dubai. This letter of termination was addressed to "Petroserv - JFK Division" and referred to discussions held in
H Petroserv JFK's office on 7 October 2002 between Merbok's Group Sales and Marketing Director (Robin A Uittenbroek) and John Frederick Keen. The letter of termination reads in its material parts (unedited):

I

Re: Termination of Business Relationship

Further to our discussions we had in the Petroserv JFK office on October 7, 2002, I hereby confirm that by the 1st January 2003, Merbok wishes to terminate the business relationship with Petroserv JFK.
We discussed the reasons for Merbok's decision.

Firstly, Merbok's business in the Middle East is 40% of our total turnover and therefore continuation of a local representation is of paramount importance. Your consideration of retirement requires us to act now to secure continuation of our relationship into the future.

Secondly, Merbok intends to grow further in the Middle East, both in the current product line, and in to be *[sic]* develop products and services. Consequently Merbok wishes to have a stronger involvement and control over its activities in the territory, as it dedicates more resources, financially and staff, to the territory.

Merbok will terminate the relationship duly and professionally and we trust Petroserv would choose likewise. All business transactions that Petroserv JFK will facilitate for us until 1st January 2003 will be dealt with business as usual and Petroserv JFK will receive sales commission when due, also when payments fall well into 2003.

As I inform you, Merbok has experienced the business relationship with Petroserv JFK as professional and (mutually) beneficial for our business in the Middle East and territory. We enjoyed working with you and your staff and are grateful for the support and leadership that has built our business and brand.

[6] There were several correspondence between the parties thereafter, with Petroserv indicating its dissatisfaction with the termination, requesting for time for it to find alternative suppliers so that the company might continue as a viable entity and hence to extend the agency agreement and the business relationship for further nine months until 1 September 2003. Merbok did not accede to this request.

The Issues In This Appeal

[7] The principal issue in the main appeal is therefore whether the notice of termination given constitutes a sufficient or reasonable notice and whether Petroserv as defendant is liable to

A pay damages for such termination. In the learned Judicial Commissioner's judgment, four issues, including the principal issue, were identified as follows:

(i) Whether it was the plaintiff (Sheikh Khaled Jassem trading as
B Petroserv General Trading Establishment) or Petroserv-JFK Division, or John Frederick Keen in person, was appointed as sole and exclusive agent of the defendant (Merbok) in the Middle East for the marketing and sales of the defendants products and whether the plaintiff had the *locus standi* to sue
C the defendant for the termination of such agency.

(ii) Whether the notice of termination dated 26 October 2002 terminating the agency of business relationship of the plaintiff or Petroserv-JFK effective from 1 January 2003 constitutes reasonable notice, or sufficient notice, and whether the
D defendant is liable to pay damages and/or compensation for such termination.

(iii) Whether the defendant is liable to pay the plaintiff the commissions as pleaded in the amended statement of claim
E and reimbursement of 50% of the expenses incurred for setting up a booth at the exhibition held in Dubai from 2 October 2002 to 6 October 2002.

(iv) "Other issues", as described by the learned Judicial
F Commissioner, to include the subsidiary issues relating to the power of attorney granted by the Sheikh to John Frederick Keen to give evidence at the trial, the adverse inference to be drawn on the failure of the plaintiff to call the Sheikh as a witness and the late service of the order for the amendment
G of the plaintiff's statement of claim.

[8] These issues, as raised in the main appeal, overlap with the issues in the interlocutory appeals. The submissions of the parties before us were addressed essentially on the main appeal, since the
H disposal of the issues in the main appeal would decide the outcome of the interlocutory appeals.

Issue On Proper Party And *Locus Standi*

[9] On the issue of *locus standi*, the learned Judicial Commissioner
I came to very clear findings of fact on the evidence presented before him, and in the circumstances it will be improper for this court to intervene and overturn the learned Judicial Commissioner's conclusions on the facts.

[10] The case for the appellant was essentially that they had dealings only with John Frederick Keen trading as Petroserv-JFK Division, not with Sheikh Khaled Jassem trading as Petroserv General Trading Establishment. The learned Judicial Commissioner found as a fact that John Frederick Keen was an employee of Petroserv General Trading Establishment, with the Sheikh being the licence holder under the laws of Dubai of the two registered business entities named Petroserv General Trading Establishment and Petroserv General Trading East (branch). The latter entity is a branch of the former. The branch is called Petroserv-JFK Division purely "for ease of reference". The official Arabic name does not refer to Petroserv-JFK Division. The following is the clear finding and conclusion of the learned Judicial Commissioner, with which we wholly agree:

> To this Court, the primary concern between the parties then could be whether JFK was able to secure business for the Defendant in the Middle East and not so much whether JFK was trading as Manager of the Plaintiff or whether he was allegedly running his own business using the Sheikh as his front or whether he was violating the Anti-Fronting law of Dubai or otherwise. These issues of capacity did not seem to exist during their dealings. It appears to this Court that at all material times, whatever the alleged arrangements between JFK and the Plaintiff or the Sheikh then whether legal or illegal was never the concern of the Defendant and whatever arrangement between them would certainly not affect the contract of agency between the Plaintiff and the Defendant involving the 3rd party clients who placed orders for the Defendant's goods or products and the subsequent shipment or delivery of them as well as the payment of commission to the Plaintiff or Petroserv - JFK division or to JFK's personal account for which the Defendant had never queried but had been readily paying such commissions. Defendant had never even asked JFK whether his alleged trade name of "Petroserv - JFK division" was a duly registered and valid entity to enable him to trade with the Defendant ...
>
> The business arrangement between Plaintiff and JFK is an internal affair of the company which is of no concern to the Defendant since they had never bothered to find out and cannot be a valid ground to vitiate all contracts concluded on the effort of Petroserv in general or of JFK in particular. On a finding of facts, I am of the view that on a balance of probabilities Petroserv - JFK division is part and parcel of the Plaintiff or of the Branch and the Plaintiff being the employer of JFK through documentary proof

A such as the Sheikh's statement in the PA, the contract of employment of JFK *inter alia*, has the *locus standi* to pursue this claim against the Defendant. (See pages 6 - 7 of the Grounds of Judgment)

B **[11]** A different High Court Judge in the earlier interlocutory application, which was dismissed and now forms the subject matter of Appeal No. 2678 (on the preliminary point of law on *locus standi*), had also observed that the challenge on *locus standi* was a belated ground raised.

C **The "Other Issues"**

[12] On these four subsidiary issues, we find them to be without merit, and therefore fully agree with the conclusions of the learned Judicial Commissioner. It is a principle too plain to belabour that a D witness called by a party does not require a power of attorney of the plaintiff to vest the witness with the competency to provide evidence under our Evidence Act 1950. We take note that appellant's counsel did not vigorously pursue the other two subsidiary issues on the drawing of an adverse inference for the E non-calling of the Sheikh, and the late filing of the amended order for amendment under O. 20 r. 9 of the Rules of the High Court 1980, which allegedly should have disallowed the respondent from proceeding on the basis of the amended statement of claim. It is sufficient to note the learned Judicial Commissioner rightly F concluded that there was no suppression of material evidence for the adverse inference to be drawn under s. 114(g) of the Evidence Act 1950, and no unfair prejudice had been caused to the respondent by the late filing. In any event, the filing was only late by a day.

G **[13]** As indicated earlier, the substantive and main ground, in this appeal concerns the notice requirement and the damages awarded by the learned Judicial Commissioner. A consideration of ss. 158 and 159 of the Contracts Act 1950, and the case authority, becomes paramount.

H **The High Court's Decision On The Notice Requirement And Damages**

[14] The High Court entered judgment in the respondent's I (Petroserv's) favour for the sum of USD65,559.52 and interest thereon at 4% per annum from the date of the writ of summons (13 October 2006) until date of full satisfaction, and USD125,000

and interest thereon at 4% per annum from the date of judgment (23 April 2012) until date of full satisfaction, and costs of RM30,000. These sums correspond to firstly, a claim for unpaid commission during the period of notice given, and secondly, for damages for wrongful termination of the agency without giving sufficient notice which the High Court determined as a six month's notice period. Since effectively prior notice of three months was given to Petroserv, the damages was calculated on the basis of three month's lost commission.

[15] A further claim for 50% of the expenses in setting up a booth at the "Index 2000 Exhibition" in Dubai to promote Merbok's products was disallowed since Petroserv had failed to prove this claim on a balance of probabilities.

[16] The quantum of the claim for unpaid commission was arrived at by the learned Judicial Commissioner upon a detailed consideration of the evidence, which we feel should not be disturbed. Likewise, the same approach should be adopted in relation to the dismissal of the claim for 50% of the expenses incurred for the Dubai Exhibition. Some attention, however, has to be addressed on the claim for compensation which was allowed based on the learned Judicial Commissioner's view that for this type of contract a six month's notice would be reasonable, although an effective three month's notice had been given to Petroserv by Merbok.

[17] Counsel for the appellant argued that there has been a fundamental misdirection on the part of the High Court in determining there should be a notice period of six months, since the facts indicated the contract here was not a fixed-term contract, and as such ss. 158 and 159 of the Contracts Act 1950 would not apply. On an interpretation of these statutory provisions and on the authority of a previous Court of Appeal decision in *American International Assurance Company Ltd v. Koh Yen Bee* [2002] 4 CLJ 49; [2002] 4 MLJ 301, an argument is advanced that where a contract is not for a fixed term, there is no requirement for reasonable notice of termination to be given. *American International Assurance Company Ltd v. Koh Yen Bee*, *supra*, has been referred to and explained in a subsequent Court of Appeal decision in *Biing Han Enterprise Sdn Bhd v. Siew Leong* [2011] 4 CLJ 465, an authority relied on by Petroserv to support its case for damages. Whilst *American International Assurance Company Ltd v. Koh Yen Bee* is a majority decision, the Court of Appeal's decision in *Biing Han*

Enterprise Sdn Bhd v. Siew Leong is a judgment of a unanimous panel, which holds that even where a contract is not a fixed-term contract, reasonable notice of termination must be given, and "a demand for reasonable compensation is not precluded" (see p. 471 of the report). Three other authorities have figured prominently in the submission advanced by counsel for the respondent, namely *Sykt Jaya v. Star Publications (M) Bhd* [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151 (a High Court decision), the Indian decision in *JK Sayani v. Bright Brothers Pvt Ltd* AIR 1980 Mad 162, and the English House of Lords decision in *Lonsdale (Trading as Lonsdale Agencies) v. Howard & Hallam Ltd* [2007] UKHL 32. We have taken note that *Lonsdale v. Howard* is decided on the basis of current regulations on commercial agencies passed in the UK (Commercial Agents (Council Directive) Regulations 1993), and to this extent the opinions expressed by the House of Lords may not be particularly apposite to our present appeal.

[18] The appellant has approached the appeal on the basis that it is to the wording of ss. 158 and 159 of the Contracts Act 1950 that this court should turn to, not decisions from India or the United Kingdom. It is forcefully argued by appellant's counsel that the decision of this court in *American International Assurance Company Ltd v. Koh Yen Bee*, *supra*, is "on all fours" and should therefore be preferred in deciding the appeals. Nonetheless, it remains necessary to carefully analyse and determine what exactly the *American International Assurance* case decided, particularly in light of *Biing Han Enterprise Sdn Bhd*, which after all is also a decision of this court.

(a) *American International Assurance Company Ltd v. Koh Yen Bee*

American International Assurance Company Ltd, *supra*, concerns an insurance agency contract where the principal relied on cl. 26(b) of the agency contract which provided:

> Subject to sooner determination of this agreement by the Company in accordance with Clause 27 thereof this Agreement may be terminated without giving any reason thereof.
>
> ... (b) by either party upon 15 day's notice in writing; ...

15 day's notice in writing was given to the agent prior to termination, but no reasons were given. The plaintiff had been an agent of the insurance company/defendant for about eight years before the termination. The agent argued that the

termination letter was given in bad faith and/or was unlawful, unfair, unjust and/or in contravention of the rules of natural justice. It was further argued that the letter of termination was without sufficient cause and that the insurance company had failed to give to the agent a reasonable notice of termination. The plaintiff succeeded in the High Court, but the High Court decision was reversed on appeal by a majority decision. Alluding to ss. 158 and 159 of the Contracts Act 1950, the majority held that these provisions only applied to fixed term contracts of agency. This conclusion was arrived at upon a scrutiny of the wording and two previous High Court decisions interpreting the provisions, namely *Chan Chow Kian v. International Trading Company* [1969] 1 LNS 20; [1969] 2 MLJ 223 and *Wong Pa Hock v. American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267.

The two sections of the Contracts Act read:

> **158. Compensation for revocation by principal or renunciation by agent**
>
> Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as a case may be, for any previous revocation of renunciation of the agency without sufficient cause.
>
> **159. Notice of revocation of renunciation**
>
> Reasonable notice must be given of such revocation of renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Placing emphasis on the words "continued for any period of time", the majority concluded s. 158 was to be read as having reference only to fixed term agency contracts. The majority then read s. 159 as being dependent on s. 158, not independent of it. The relevant passages appear at p. 59 of the report, and the same is quoted below:

> We are unable to find any indication that the contract is meant to be for any fixed period of time, be it for one year or whatever. The only indication, perhaps, is that the schedule of commissions is to be signed annually ...

A

> In the circumstances, we are of the view that the agency contract is not "for any period of time", meaning a fixed or definite period of time. Therefore, the provision of section 158 is not applicable. Therefore, it was not revoked or renounced "previous" to the expiry of the period, as the period does not exist. Therefore the issue whether there was sufficient cause or not did not arise. We now come to section 159.
>
> In brief, section 159 says that reasonable notice must be given for such revocation or renunciation, otherwise the damage to the principal or agent must be made good. The question is whether section 159 is independent of section 158 meaning that in all cases of revocations and renunciations, reasonable notice must be given otherwise the damage resulting thereby must be made good ...
>
> Again, we prefer to look at the section and interpret it. We are of the view that the words "such revocation and renunciation" only refer to a revocation or renunciation under section 158. First, this section follows immediately after section 158. Secondly, there is no reason for the word "such" to be used if it is only meant to refer to the revocation and renunciation mentioned in section 158. Thirdly, section 159 uses the very same words used in section 158 ie, "revocation and renunciation."

B C D E

In the upshot, the majority then decided that cl. 26(b) of the agency contract was perfectly valid since the particular agency contract was not a fixed term contract. That is the *ratio decidendi* of this Court of Appeal decision which in effect held that the 15 day's prior notice without express reasons being given for the termination was good in law. One can perfectly understand that based on the principle of freedom of contract, parties who enter into an agency contract with their eyes open and fully appreciating that the agency contract provides for a very short notice period, must be held to their bargain. With respect, however, the court in *American International Assurance Company Ltd* did not decide or form a concluded view that there was no requirement for reasonable notice to be given for all cases where the agency contract was not for a fixed or definite term.

F G H

I

(b) *Biing Han Enterprise Sdn Bhd*

Biing Han Enterprise Sdn Bhd, *supra*, has made it clear that a demand for reasonable compensation is not precluded by ss. 158 and 159 even where the agency contract is not for a fixed term.

Generally considered, where no fixed notice period pre-agreed between the parties exists and the contract is not for a fixed term, the law should in all fairness and equity require a reasonable notice of termination to be given, at least where the agency in question is not a "pure agency" *simpliciter*. A relationship between a principal and an ordinary salesman will be one such instance of a "pure agency". That certainly was the position at common law, and to interpret the Contracts Act contrary to it will flout accepted rules of interpretation, since our Contracts Act is not drafted as a complete code, nor intended to be one. Where it is silent on a particular area of the law, recourse may be had to the common law.

As for the common law position, see eg, *Anson's Law of Contract* (28th edn.):

> ... where the agency is a continuing one, and analogous to a contract of service, the agent undertaking to serve the principal and the principal to pay for the services rendered, there is an implied term in the contract that the agency will not be revoked summarily, but only on reasonable notice. (at page 694 of the commentary)

See also *Martin-Baker Aircraft Co Ltd v. Canada Flight Equipment Ltd* [1955] 2 QB 556, for a statement of the common law position. The principle cited in *Martin-Baker Aircraft Co Ltd* is succinctly summarised in the headnote of the reported decision as follows:

> That the agreement of March 9, 1954, was not a pure agency agreement and, as such, determinable summarily at any moment, but, looked at as a whole, was an agreement under which the person described as sole selling agent had to expend much time and money and was subject to restrictions as to the sale of the other persons' products and fell into the category of agreements analogous to that of a master and servant which was terminable by reasonable notice. The express provisions for summary determination

A were merely a restriction of the rights of summary determination which always existed in such contracts in certain events which did not take the agreement out of that category, and, accordingly, the relationship created being essentially a commercial relationship and one of confidence and trust, the agreement was determinable on reasonable notice.
B

[19] *Biing Han Enterprise Sdn Bhd* relates to a direct selling agency contract that was terminated by the principal, ie, the direct selling company. The respondent in that case was its Distributor C Manager. The contract was not a fixed term contract and the termination was effected summarily by letter. The court followed the reasoning in *American International Assurance Company Ltd*, but proceeded further to consider the position where an agency contract was not for a fixed term. The court explained the legal D position thus:

Neither party had claimed there was any fixed term contract. The relevant question is what happens when there is no fixed term and sections 158 and 159 of the Contracts Act 1950 are not applicable? To answer this question, it is necessary to understand E sections 158 and 159.

These two sections concern principals and agents, agency and commissions. The nature of damage suffered upon an earlier revocation or termination is the loss of earnings until another F employment, principal or agent is found. The words "such revocation or renunciation" in section 159 necessarily requires it to be read conjunctively with section 158. The effect of reading section 158 together with section 159 is that not only notice must be given, but it must be reasonable notice of such revocation or termination, to be given so that there is no damage resulting to G the other party. What is reasonable in one case may be different from another. These two sections preclude the agent from a claim to compensation for the remaining part of the term and the principal to claim for compensation likewise. Reasonable notice thus precludes payment of compensation by one party to the other. H

Since sections 158 and 159 do not apply when there is no fixed term, the demand for payment of reasonable compensation is not precluded. The termination by the Appellant's solicitor's letter dated 25th May 2001 was with immediate effect ... (See pages 470 to 471 I of the report) (emphasis added).

[20] It is now clear from the decision of this court in *Biing Han Enterprise Sdn Bhd* that reasonable notice of termination must still be accorded even though an agency contract is not for a fixed term. What amounts to a reasonable notice is of course dependent on the facts and circumstances of the particular case. In *Biing Han Enterprise Sdn Bhd*, the court was of the view that six month's notice was reasonable since the agency was in relation to a product (ginseng) which could not be regarded as a usual, common product.

[21] It is noteworthy that although the approach adopted by our court may be different as compared to that of the Indian courts when reading the equivalent provisions in the Indian Contract Act 1872 (ss. 205 and 206), the penultimate result remains the same, as exemplified in the judgment of the Indian court in *JK Sayani v. Bright Brothers Pvt Ltd* AIR 1980 Mad 162, which has been cited in submission before us. The reasoning of the Indian Court is attractive and deserves mention to articulate the underlying principles. After all, statutory interpretation is not a mere matter of technical, linguistic construction, but has to be grounded on juristic principles and proper context. To quote the Indian Supreme Court:

> We are therefore of opinion that whether there is an express or implied contract that the agency should be continued for any period of time, a reasonable notice of such revocation of renunciation as the case may be is necessary. No doubt agency is based on trust and confidence. But such trust and confidence also cannot be whittled down by whims and fancies by one party by deliberately creating a wrong to the other. If the contract itself provides for the issuance of the notice, then the matter is beyond doubt and difficulty. But if the contract is silent about such notice the statute contemplates a reasonable notice ... This again implies that the agency which has been terminated prematurely could be the subject matter of complaint by the aggrieved person on the ground that no reasonable notice was given to him. Though strictly agency does not fall under the doctrine of master and servant, yet the principles applicable to such relationship could be invoked in the name of good conscience, as otherwise the men aggrieved would be without any remedy whatsoever ... (At page 166 of the report)

[22] An agency relationship, as eloquently stated in the above extract, rests on trust and confidence, and shares some similarities with the relationship between an employer and employee. No doubt, the linchpin in the relationship is contract and the freedom of contract has to be recognised. Where an agency is contractually for a fixed term, and quite often parties agree on a clear notice period, they should be bound by it. In any event, the period of notice has to be reasonable, and furthermore, a fixed term agency cannot be terminated without sufficient cause, consistent with ss. 157 and 158. Where parties have not expressly agreed upfront on a period of notice and the contract is not for a fixed term, although in most cases of commercial agency it will be of a continuing nature, termination should also be preceded by a reasonable period of notice.

Conclusion

[23] Thus, upon the above consideration of the law, particularly in light of this court's decision in *Biing Han Enterprise Sdn Bhd*, *supra*, we find no error on the part of the learned Judicial Commissioner in requiring reasonable notice to be given to the respondent. The issue now is whether the learned Judicial Commissioner's decision that six month's notice is reasonable can be supported on the evidence. In *Biing Han Enterprise Sdn Bhd* of course the reasonable notice period was equated with six months on the basis that the product being distributed by the agent was not a common product. In the cross-appeal by the Petroserv, it has been argued that a reasonable period of notice for termination would be one year for this type of agency. The jurisdiction of this court to intervene against a decision of the High Court has to rest on settled principles; this court should only upset a decision of the High Court where there is a clear error leading to a perverse finding or resulting in a miscarriage of justice, particularly where the lower court has decided on the basis of discretion. Where there has been a proper judicial appreciation of the evidence and a correct application of the law and it cannot be said the learned judge has been plainly wrong, the High Court decision should be respected. The award of costs, in particular, is a matter of discretion and this court must be slow to substitute its own views for those of the High Court. The learned Judicial Commissioner has meticulously considered the peculiar circumstances of the case, and was satisfied that a period of six months was a fair and reasonable

period for the plaintiff (Petroserv) to adjust its business after having lost a major part of its income by way of the commissions received from the agency contract with Merbok Hilir. On the evidence, the agency relationship had lasted 8½ years, but the High Court also considered the fact that Petroserv had not expended capital investment to hold stocks or to build or rent godowns. As for the method of quantification of damages, the learned Judicial Commissioner preferred to calculate the damages with reference to the commissions earned by New Gulf Wood (the agency which succeeded Petroserv) from Merbok Hilir since 2003. The court took the monthly average from the yearly figure of RM500,000 earned by New Gulf Wood as commissions. This method of calculation, we feel, is appropriate to calculate the commissions lost by Petroserv for the remaining period of three months. Very simply, what is New Gulf Wood's gain translates into Petroserv's loss. We are therefore of the view, after considering the totality of the circumstances, the learned Judicial Commissioner came to a correct decision both on the law and the facts which should not be interfered.

[24] The main appeal is therefore dismissed with costs, so too the cross-appeal with costs. Since the appeals in the interlocutory proceedings are dependent on the outcome of the main appeal, these three related interlocutory appeals, namely Civil Appeals No. P-(02)(IM)-876-04-2012, P-(02)(IM)-877-04-2012 and P-02(IM)-2678-10/2011, are likewise dismissed with costs. A global sum of RM20,000 is awarded as costs of the appeals to be paid by the appellant to the respondent. The deposit is to be refunded to the appellant.